



August 29, 2000

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P. O. Box 16630
Austin, Texas 78761-6630

OR2000-3349

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138520.

The Texas Lottery Commission (the "commission") received a request for various information regarding a computer problem and GTECH Holdings Corporation ("GTECH"). The requestor specifically requests the following information:

[A]ny and all correspondence or other communication between the agency, the [commission] and [GTECH] regarding a computer problem referred to in your May 31, 2000 letter to Mr. William Y. O'Connor, the [GTECH] chairman.

These exchanges would have occurred sometimes [sic] in 1992, 1993, 1994 and 1995.

I am also requesting copies of any reports, memos, notes or other material prepared by staff detailing the results of any investigation or inquiry into the computer problem and any recommendations and/or penalties against [GTECH].

You have sought a decision from this office pursuant to section 552.305 of the Government Code as to whether the requested information is excepted from required public disclosure. You have submitted exhibit B as responsive to the request. Therefore, we assume that you

have released to the requestor all other information that is responsive to the request. If you have not yet released the other responsive information, you must do so at this time. *See* Gov't Code §§ 552.301, 552.302. You indicate that the information may be excepted from disclosure by sections 552.101 and 552.110 of the Government Code. You have notified GTECH of the request in compliance with section 552.305 of the Government Code. *See* Gov't Code § 552.305(b) (permitting interested third party to submit to attorney general reasons why requested information should not be released). GTECH has responded to the notice asserting that exhibit B is nonresponsive to the request and, in the alternative, that the exhibit contains confidential and proprietary information. We have considered the claimed exceptions and reviewed the submitted information.

We begin by addressing GTECH's assertion that exhibit B is nonresponsive to the request. GTECH argues that exhibit B, in its entirety, is nonresponsive to the request because the document appears to have been created in the year 2000 while the requestor limits the request to documents created during the years of 1992 to 1995. We disagree that the requestor has limited the request to these dates. While the request, in part, restricts the information to these dates, the second portion of the request can be read to not contain the date restriction. Exhibit B appears to be responsive to the second portion of the request.

GTECH also argues that the last two sentences of exhibit B are outside the scope of the request as they do not relate to the computer problem referred to in the commission's May 31, 2000 letter to William O'Connor. Based on this representation, the commission may redact this portion of the exhibit.

Next, we consider GTECH's claim that the exhibit contains confidential and proprietary information. GTECH asserts that the information "contains confidential and proprietary information of GTECH, reflecting as it does confidential preliminary testing." GTECH provides no other supporting arguments other than this generalized statement.

Government Code section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which defines a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a

chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). When a governmental body takes no position with regard to the application of the trade secrets prong of section 552.110 to requested information, we accept a private entity's claim for exception as valid under that prong if that entity establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5* (1990).

The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2* (1982), 306 at 2 (1982), 255 at 2 (1980).

We conclude that GTECH has not made a *prima facie* case that the information contains trade secrets. Therefore, the commission may not withhold the submitted information under the trade secrets prong of section 552.110.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See Open Records Decision No. 661 at 5-6* (1999). GTECH has not demonstrated that substantial competitive injury would result from the disclosure of the submitted

information. Thus, the commission may not withhold the submitted information under the commercial or financial branch of section 552.110.

In conclusion, although the commission may redact the last two sentences of exhibit B as unresponsive to the request, the remaining submitted information is not excepted from disclosure under section 552.110 and must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Julie Reagan Watson" followed by a horizontal flourish.

Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 138520

Encl. Submitted documents

cc: Mr. George Kuempel
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(w/o enclosures)

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